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IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 881

IN THE MATTER

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner, and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Charterer of the Steamship "VENICE MARU", for Exoneration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., et al.,
Cargo Claimants-Petitioners,

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE C. SPRAGUE,
Counsel for Respondents.

New York, N. Y., April 24, 1943.

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STATUTES

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Statement

Counsel for respondents herein, with the approval of the Alien Property Custodian, was retained in January, 1942 by Standard Surety and Casualty Co. of New York, the bonding company which gave the *ad interim* stipulation for respondents in this proceeding, to continue the appeal proceedings in the Circuit Court of Appeals which had been begun before the outbreak of war. The Alien Property Custodian by vesting orders Nos. 77 and 80, both

dated July 30, 1942, vested in himself all property in the United States of Kawasaki Kisen Kabushiki Kaisha, one of the respondents herein.

This cause presents no reason within Rule 28, paragraph 5, for the issuance of a writ of certiorari. Contrary to petitioners' assertions, neither the decision of the Circuit Court of Appeals (R. 2040-56, reported in 133 F. [2d] 781) nor the decision of the District Court. (R. 1971-79, reported in 39 Fed. Supp. 349) is in conflict with applicable decisions of this Court or with applicable decisions of another Circuit Court of Appeals. Local decisions are not involved since the sole question at issue is the interpretation and applicability of the federal Fire Statute (Act of March 3, 1851, c. 43, Sec. 1, 9 Stat. 635, now 46 U. S. Code, Sec. 182, formerly R. S. 4282).

The questions involved on this petition are not of general importance nor do they affect the public interest. They merely relate to the application of the Fire Statute, which has been frequently before this Court for interpretation during the ninety-two years since its adoption, to the contractual relationship that existed between petitioners as shippers of cargo upon the *Venice Maru* and respondents, who were respectively owner and bareboat charterer of that vessel. This statute has been recently analyzed and interpreted in *Earle & Stoddart* v. *Wilson Line* (*The Galileo*), 287 U. S. 420, where all doubts as to its scope as a statute of exoneration were set at rest, this Court specifically holding that the duty of making the vessel seaworthy was delegable thereunder, saying:

> "The fire statute, in terms, relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner'. The statute makes no other exception from the complete immunity granted" (p. 425).

and

> "The courts have been careful not to thwart the purpose of the fire statute by interpreting as 'neglect' of the owners the breach of what in other connections is held to be a non-delegable duty" (p. 427).

The basic points upon which the courts below exonerated respondents from liability to petitioners were firmly established by the decision in *The Galileo*, supra, and in the earlier cases in this Court of *Walker* v. *Western Transp. Co.*, 3 Wall. 150, and *Craig* v. *Continental Ins. Co.*, 141 U. S. 638.

The Cause Below

On July 5, 1934 the *Venice Maru* at Kobe, Japan, being then partly loaded, lifted 38,000 bags of sardine meal for U. S. Atlantic ports via the Panama Canal, of which 13,312 bags were stowed in No. 1 lower hold, 17,917 bags in No. 3 lower hold and 'tween deck and 6,735 bags in No. 6 lower hold, all shipped by a single consignor. Other general cargo was loaded at Kobe and thereafter the vessel at Nagoya lifted 1,087 cases of porcelain goods which were stowed upon the weather deck, to which deck cargo 595 more cases of porcelain were later added at Yokohama, whence she sailed for destination on July 13, with her holds full and a deck cargo covering most of the free deck space including the after two-thirds of No. 1 weather deck hatch.

The vessel arrived at Los Angeles without mishap, where she discharged a small amount of cargo from No. 1 'tween decks and thence sailed for Balboa on July 30. On the morning of August 6 smoke was observed coming out of the No. 1 hold ventilators, and an examination showed the sardine meal in that hold to be heating; fire eventually broke out resulting in damage to this and other cargo in holds 1 and 2. After the fire had been extinguished at Balboa, the spoiled cargo removed and the holds affected by the fire cleaned, the undamaged cargo was restowed and the vessel proceeded to New York and her other ports of destination where respondent-charterer demanded general average guarantees or cash deposits to secure payment of cargo's proportion of the general average expenses

arising out of the steps taken to extinguish the fire. Later a general average was stated.

The owners of the cargo that had been destroyed or damaged by the fire or water used to extinguish it filed libels *in rem* against the vessel and *in personam* against the bareboat charterer (operator) for their damages, whereupon the respondents as owner and bareboat charterer respectively of the vessel filed the petition herein for exoneration from or limitation of liability in which they pleaded the Fire Statute and filed an *ad interim* stipulation for value therein in the sum of $245,000 with interest as provided by law. Petitioners herein having filed their claims in the proceeding and answered the petition, the cause came to trial on the issues thus joined. Both courts concluded that respondents were entitled to exoneration from liability to claimants under the Fire Statute although they found that the vessel was unseaworthy with respect to the stowage of the sardine meal in No. 1 hold and that this caused the fire, holding that this unseaworthiness in respect to stowage was not neglect or design of the respondents within the Fire Statute since they had delegated the duty of laying out and supervising the stowage of the sardine meal to an expert, Lloyd's agent marine surveyor at Kobe, and that this duty was delegable under the Fire Statute, citing *Earle & Stoddart* v. *Wilson Line* (*The Galileo*), 287 U.S. 420. However, they declined to allow respondent-charterer to retain cash general average deposits, which it had exacted from certain claimants, because the terms of the old form Jason clause in the bills of lading contained phraseology similar to Section 3 of the Harter Act under which the duty to make the vessel seaworthy is non-delegable. The decree exonerated the owner-respondent in all respects with costs as against claimants and exonerated the bareboat charterer-respondent in all respects except as to liability (1) for the return of cash general average deposits to two claimants, and (2) for contribution in general average to certain other claimants.

The material findings of fact are contained in the following quotation from the opinion of the Circuit Court of Appeals:

"The sardine meal laden at Kobe was well within the range of high grade Japanese sardine meal; the bags were proper, and the cargo was fit for carriage by sea from Kobe to New York when properly stowed and ventilated. No. 1 lower held was from 20 to 23½ feet deep; above it was the lower 'tweendecks 9½ feet deep, and above that a second 'tweendecks, or shelter deck compartment, 8 feet deep. Six hundred and sixty-five tons of the meal—a little more than one-third of the whole consignment—were stowed in No. 1 hold, and occupied the entire hold except for a space of about a foot or eighteen inches along the bulkheads and along the sides of the ship, and for about the same space between the top of the stow and the overhead deck beams. A channel one foot wide ran athwartship through the middle, except for which the stow was a solid block. Five rows of 'rice ventilators' ran fore and aft in the 5th, 10th and 16th tiers, and six rows athwartship in the 6th, 11th and 17th tiers; vertical ventilators connected these horizontal ventilators at the four corners of the hatch. Besides these there was a permanent ventilating system such as was usual in ships of her class.

Sardine meal, like other fish meal, when stowed on long voyages, is likely to heat and to take fire spontaneously; its susceptibility depends upon the percentage of moisture and oil which it contains. It had been a common cargo from Japan to Pacific coast ports in small parcels for five or more years before this voyage of the 'Venice Maru', and no damage had ever occurred; the charterer had itself successfully carried it on over eighty voyages before September 1, 1933, and in one of these, that of the S.S. 'Florida' on December 23, 1930, the cargo was nearly as great as on the 'Venice Maru'. The charterer's first shipment to Atlantic ports was on February 3, 1933, followed by eight other steamers—the largest consignment in which was 1100 tons; all came through undamaged. On September 1, 1933, however, the cargo of the 'Montreal Maru', which had left Yokohama with 2300 tons, was found to have been in part heated at its outturn in

New York on October 6. Three steamers followed to New York without incident, but on December 6th, the 'Soyo Maru', which had left Yokohama on October 28, arrived in New York with about 1000 tons, also heated. Ten ships then followed to New York all without damage. On April 5, 1934, the 'Soyo Maru' again left Yokohama with 1100 tons; the 'Tohsei Maru' on the 25th with 560 tons; the 'Nichiyo Maru' on the 28th with 1117; and the cargoes of all three heated. In the case of the last two this happened in spite of the use of 'rice ventilators'. The charterer attributed this to the quality of the meal itself, which had been manufactured at a small factory near Nagoya; and for that reason it refused to take any further meal from that shipper. Two cargoes were then despatched and arrived in good condition; but not so, the cargoes of the 'Montreal Maru' leaving Yokohama on June 14th and arriving in New York on July 20th, or of the 'Getsuyo Maru', leaving Yokohama on June 28th, and arriving in New York on July 29th. Although neither of these last two vessels contained any Nagoya meal and both carried 'rice ventilators', the cargo of each heated.

After the charterer learned of the damage done on the three ships leaving in April, the latest of which, the 'Tohsei Maru', arrived on June 1st, it not only gave directions to take no more of the Nagoya meal, but it retained one, Fegen, to take charge of the stowage of any future shipments, and the first ship which he stowed was the 'Getsuyo Maru'. He had been a marine surveyor for 23 years, all the time in Kobe acting as Lloyd's agent; he had surveyed all sorts of cargoes including sardine meal; before becoming a surveyor he had had twenty years sea experience from seaman to captain; and he held a master's license both on British and Japanese ships. Although as a master he had never carried sardine or other fish meal, he had frequently carried another perishable cargo, rice, and was familiar with the use of 'rice ventilators'. It was he who had stowed No. 1 lower hold of the 'Venice Maru' in the way we have described. The charterer's business was in charge of one, Okubo, who lived in Kobe, and who alone had the active direction of its affairs, although it had a president, who was inactive. Okubo knew of the previous heating of

all the cargoes mentioned except those leaving in June; he did not tell Fegen of these when he retained him, and he paid no further attention to the stowage" (R. 2041-43).

Argument

Petitioners' argument involves four distinct propositions, as follows:

A. That the burden of proving design and neglect of the shipowner is not upon the cargo owner under the Fire Statute (question III of petition and Point III of supporting brief).

B. That the Fire Statute, while exonerating the shipowner from liability *in personam*, leaves him liable to the extent of the value of his ship (question V of petition and Point V of supporting brief).

C. That the acceptance for transportation of hazardous cargo like sardine meal, when stowage thereof was still "in flux", constituted "design or neglect" of respondents within the Fire Statute (questions I and IV of petition and Points I and IV of supporting brief).

D. That delegation by respondents of the duty of laying out and supervising the stowage of hazardous cargo, like sardine meal, to a stowage expert, without informing him of five instances of heating of this commodity that had occurred on the 112 voyages of respondents' vessels, was "neglect" within the Fire Statute (question II of petition and Point II of supporting brief).

None of these four propositions can be sustained as I shall now show.

POINT I

(Answering Proposition A)

The Circuit Court of Appeals was correct in its holding below that under the Fire Statute (46 U. S. C. 182) the burden is on cargo-claimants to prove that the fire was caused by the "design or neglect" of the shipowner in order to deprive the shipowner of the complete immunity given by the statute; this holding is not in conflict with decisions of other Circuit Courts of Appeal or of this Court.

Petitioners urge that the Circuit Court of Appeals for the Second Circuit erred in holding below that the burden is on the cargo owners to show "neglect" under the Fire Statute and that such holding is in conflict with decisions in other Circuits (petition, question III, pp. 14-17; brief, Point III, pp. 31-37). They complain because the Court "does not state why" there should be a distinction between the first and third sections of the Act of March 3, 1851 as respects burden of proof (petition, p. 14).[1] But the

[1] The first section of the Act is the Fire Statute; the third section is the Limitation of Liability Statute. They are as follows:

(1) "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner" (46 U. S. C. 182).

(3) "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending" (46 U. S. C. 183).

(I have followed petitioners' method of quoting from the original Act of March 3, 1851, although Section 3 thereof was amended on August 29, 1935 and June 5, 1936, in certain respects totally immaterial to the issues herein.)

reasons for such distinction are self-evident when one considers the difference in wording between the two sections. The relevant part of the first section is as follows:

> "*No owner of any vessel shall be liable* * * * for * * * loss or damage * * * by means of any fire * * * *unless such fire is caused by the design or neglect of such owner*" (46 U. S. C. 182).[2]

The relevant part of the third section is as follows:

> "*The liability of the owner of any vessel* * * * *for any loss*, damage or injury * * * done, occasioned, or incurred *without the privity, or knowledge of such owner* * * * *shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending*" (46 U. S. C. 183).

The distinction between the emphasized word "unless" in the first section and the emphasized word "without" in the third section is obvious. The words "*unless caused by the design or neglect*" in the first section connote an exception to the complete immunity already given; the words "*without the privity or knowledge*" in the third section connote a condition precedent to the owner's obtaining limitation of liability. It necessarily follows that under the first section cargo claimants must prove that the shipowner's design or neglect caused the fire in order to deprive it of immunity, although under the third section the shipowner must prove that the loss occurred without its privity or knowledge in order to obtain limitation of liability.

Contrary to what one might infer from petitioners' brief, none of the American cases cited therein (*Walker* v. *Transportation Co.*, 3 Wall. 150; *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420; *Providence etc. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, or *Bank Line* v. *Porter*, 25 F. [2d] 843) even discussed the burden of proving design or neglect under the Fire Statute, much less held that such burden was not upon cargo owners. Whenever the Circuit Court

[2] Emphasis throughout brief is mine unless otherwise noted.

of Appeals in any Circuit has directed its attention to this issue, it has recognized that this burden is left on cargo owners by the terms of the statute.

The decision of the District Court for the Eastern District of South Carolina in *Charbonnier et al.* v. *United States*, 45 F. (2d) 166, held that the burden was upon the cargo owner in the following words:

> "It is true that the burden under the Fire Statute is not upon the shipowner to show the cause of the fire; and it is also true that the fact that he did not show the cause does not show that it was caused in the way the cargo owners claim; and it is also true that if the proof leaves the matter purely one of speculation as to the origin of the fire, the Fire Statute (46 U. S. C. A., Sec. 182) prevents a recovery by the cargo owners" (p. 170).

The Circuit Court of Appeals for the Fourth Circuit affirmed (45 F. [2d] 174) the District Court decision without in any way questioning the quoted holding, a year and a half after it had rendered its decision in *Bank Line* v. *Porter*, 25 F. (2d) 843, which petitioners claim is in conflict with the decision below by the Second Circuit Court of Appeals (petition, p. 16). If the Circuit Court of Appeals had held in *Bank Line* v. *Porter*, supra, that the burden of showing freedom from neglect or design was upon the shipowner, would it have affirmed the District Court decision in *Charbonnier* v. *United States*, supra, which contained a flat holding to the contrary without express disapproval of that holding? Far from so doing the Circuit Court of Appeals said: "The exhaustive and painstaking opinion of the District Judge in these cases • • • correctly sets out the issue • • •" (45 F. [2d] 174, 175).

Bank Line v. *Porter*, supra, held that the fire was caused by the neglect of the owner to take proper precautions to unload or ventilate the combustible cargo of jute during the long delay at tropical ports caused by breakdowns of the vessel; it did not discuss or determine the issue of burden of proof. The neglect which defeated the owner's

right to exoneration under the Fire Statute in that case was not neglect to advise the surveyor of the vessel's breakdowns on her voyage out to India; it was neglect to care for the cargo during the breakdowns on the voyage home. The owner's failure to give the surveyor the facts of prior breakdowns of her machinery was held by the Court to render his certificate of seaworthiness unreliable and of no probative value; it was not held to be "neglect" within the Fire Statute.

As early as 1873 in *Keene* v. *The Whistler*, 14 Fed. Cas. 208, Fed. Cas. No. 7,645, the District Court for the District of California held:

> "The damage in this case having been caused by fire 'happening on board' the above vessel, the burden of proof is on the libellant to show that such fire was caused by the design or neglect of the owner or owners of the vessel" (p. 208).

No reported decision under the Fire Statute has ever held to the contrary.

Petitioners have misquoted (petition, p. 15) a portion of this Court's opinion in *Walker* v. *Transportation Co.*, 3 Wall. 150, 153. The exact words employed by Mr. Justice Miller are as follows:

> "The language of the 1st section is, that no owner or owners of any ship or vessel shall be liable to answer for any loss or damage which may happen by reason or means of fire on board such ship or vessel 'unless such fire is caused by the design or neglect of such owner or owners.' The owners are here released from liability for loss by fire, in all cases not coming within the exception. The exception is of cases where the fire can be *charged* to the owners' design, or the owners' neglect" (p. 153).

This is not saying that owners must prove an absence of design or neglect, but rather that they are released from liability unless the fire is shown to have been "charged to" their design or neglect. The decision below is in full accord with that principle.

This Court in making the statement quoted by petitioners (petition, p. 15) from *Providence etc. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, was not considering the question of burden of proof but rather supporting its premise that damage by fire might come within the third section of the Act of 1851 as well as the first, i.e., that even if the owner was not entitled to exoneration under the first section, he might limit his liability to the value of the vessel and her freights under the third. The Court said:

> "The conditions of proof, in order to avoid a total or a partial liability under the respective sections, are very different" (p. 602).

In *Craig* v. *The Continental Insurance Co., etc.*, 141 U. S. 638, this Court said:

> "* * * it was held by this court, in *Walker* v. *Western Transportation Co.*, 70 U. S., 3 Wall. 150, in regard to the statute (Act of March 3, 1851; § 1, 9 Stat. at L. 635, now § 4282 of the Revised Statutes) * * * that, in order to make the owner of a vessel, *in case of loss by fire, liable for negligence, it must appear that the owner had directly participated in the negligence*" (p. 646).

Hines v. *Butler*, 278 F. 877, cited by petitioners (brief, p. 33) in support of their contention that Circuits other than the Second have placed the burden of proving freedom from negligence on the owner, does not even mention the burden of proof. If any inference may be drawn from the language used, it is that the burden is on the cargo claimants. The Court said:

> "Upon the hearing below, the learned District Judge held that *the evidence showed such neglect* on the part of the owner of the vessel that he was not entitled to freedom from liability as provided in section 4282 * * *. In other words, it was held by the District Court that the Director General of Railroads was not entitled to exemption from all liability under section 4282, because the *testimony established that the fire was caused by the neglect of the owner*" (p. 879).

The District Court's opinion in that cause, reported in 264 F. 986, does not, as petitioners claim, make it "fairly apparent" that it considered the burden of proof to rest upon the shipowner under the Fire Statute and the opinion was not so interpreted by the Circuit Court of Appeals.

It is noteworthy that one of the District Courts in the Ninth Circuit in *The President Wilson* (N. D. Calif., S. D.), 5 Fed. Supp. 684, expressly followed the principle which the Fourth and Second Circuits had previously recognized, saying:

> "* * * to remove the vessel from the exemption of the 'fire statute' it was incumbent upon the libelant to show that the fire was caused by the design or neglect of the shipowner. This burden has not been discharged by the libelant. The Salvore, (C. C. A.) 60 F. (2d) 683; Charbonnier v. U. S., (D. C.) 45 F. (2d) 166, affirmed (C. C. A.) 45 F. (2d) 174" (p. 686).

The Court which rendered the decision in *The President Wilson*, supra, would certainly have followed its own Circuit Court of Appeals had it ever ruled otherwise than the Second and Fourth Circuits. It was the Ninth Circuit Court of Appeals which decided *Williams S.S. Co.* v. *Wilbur*, 9 F. (2d) 622, on which petitioners place great reliance throughout their brief.

The English Fire Statute as quoted by petitioners (footnote, petition, p. 16) expressly limits the loss or damage by fire from the consequence of which the shipowner is exonerated to that "happening *without his actual fault or privity*", language which is similar to that used in the American Limitation Statute and not to that used in the American Fire Statute, supra, p. 8. The English Fire Statute makes absence of fault or privity a condition precedent to the immunity; the American Fire Statute grants the immunity subject to a single exception. The distinction is obvious. The English cases cited by petitioners (brief, pp. 34, 36), *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.* (1915), A. C. 705, affirming (1914) 1 K. B.

419, 432; *Ingram & Royle* v. *Services Maritimes du Treport* (1914), 1 K. B. 541, 559; *Royal Exchange Assurance* v. *Kingsley Navig. Co.* (1923), A. C. 235; *Standard Oil Co.* v. *Clan Line Steamers* (1924), A. C. 100, are clearly distinguishable since they deal with statutes[3] whose language is materially different from that of the American Fire Statute.

The Circuit Court of Appeals for the Second Circuit has never denied that the carrier must bring itself within the exemption from liability granted by the Fire Statute by showing that the loss was due to fire. It has merely held that once the carrier brings itself within that exemption, the burden is on the cargo to prove that the fire was, in turn, caused by the design or neglect of the owner. The court below cited the decision of the United States District Court for the Eastern District of New York in *The Strathdon*, 8 F. 374, wherein Judge Thomas had said:

> "From ordinary rules, it is inferred easily that, after the loss has been shown to have arisen from

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[3] *British Fire Statute—Merchant Shipping Act*, Sec. 502:

> "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,
>
> (1) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; * * *."

Canadian Water Carriage of Goods Act, 1910, Sec. 7:

> "The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, [illegible] of the sea or other navigable waters, acts of God or [illegible] enemies, or inherent defect, quality or vice of the t[illegible] arried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees" (1910, c. 61; s. 7).

> fire, the burden is on those asserting that the fire was caused by the ship owner's design or neglect to prove it, and indeed, the authorities are to that effect. Keene v. The Whistler, 2 Sawy. 348, 14 Fed. Cas. 208; The Victory, 168 U. S. 410, 423, 18 Sup. Ct. 140; Claflin v. Meyer, 75 N. Y. 260" (p. 378).

In *The Older*, 65 F. (2d) 359, 360, the Circuit Court of Appeals for the Second Circuit said:

> "* * * the case comes down to whether the libelant has proved that the fire was caused by his 'design or neglect'; the burden in such cases being on the injured party. The Salvore, 60 F. (2d) 683; The Strathdon (D. C.), 89 F. 374, 378. The situation is like any other where the claimant brings himself within an exemption, in which event the libelant must prove that he has been negligent."

This holding of the Circuit Court of Appeals for the Second Circuit is entirely in accord with the decisions of this Court. In *The Victory*, 168 U. S. 410, 423, the Court said:

> "'Collision' was an exception in all the bills of lading, and * * * as the damage was occasioned by collision and within the exception, it rested upon the underwriters in this case to defeat the operation of the exception by proof of such negligence on the part of the Plymothian as would justify a decree against her if sued alone."

Petitioners have cited numerous cases in this Court (brief, p. 35), which, it is claimed, the Circuit Court of Appeals for the Second Circuit has violated in principle. The leading case so cited is *Clark* v. *Barnwell*, 12 How. 272, which, however, fails to support petitioners' contention as the following quotation clearly shows:

> "After the damage to the goods * * * has been established, the burden lies upon the respondents [carrier] to show that it was occasioned by one of the perils from which they were exempted by the bill of lading,

and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence, and inattention to his duty. Hence it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. *But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him*" (p. 280).

We shall not quote passages from each of the other cases cited by petitioners, namely, *Lawrence* v. *Minturn*, 58 U. S. 100; *The Mohler*, 88 U. S. 230; *The Edwin I. Morrison*, 153 U. S. 199; *The Malcolm Baxter, Jr.*, 277 U. S. 323, and *The Vallescura*, 293 U. S. 296, but confidently submit that each upon analysis will be found to be in full accord with *Clark* v. *Barnwell* (supra), *The Strathdon*, 89 F. 374, *The Salvore*, 60 F. (2d) 683, *The Older*, 65 F. (2d) 359, and the decision below in the cause at bar. In all these cited cases the exemption was contractual, i.e., the bills of lading provided for exemption from liability in the case of loss from enumerated perils. The Court, however, refused to recognize the exemptions as absolute and permitted recovery when negligence of the carrier was proved by the cargo claimants. The sole difference between the contractual exemptions from liability of shipowners in bills of lading and the immunity given such owners by the Fire Statute is that negligence impliedly deprives such owner of immunity in the former while it expressly deprives it of immunity in the latter.

The Circuit Court of Appeals for the Second Circuit was clearly right when it held below:

"Since the claimants have the burden of proving 'neglect' under this statute—unlike the Limited Lia-

bility Statute—they must in any event fail upon this issue, for by no stretch can it be said that they proved that the fire was 'caused' by Fegen's ignorance of the charterer's past experience. *The Strathdon*, 89 Fed. Rep. 374, 378; *The Salvore*, 60 F. (2d) 683 (C. C. A. 2); *The Older*, 65 F. (2d) 359 (C. C. A. 2)" (R. 2046).

POINT II

(Answering Proposition B)

The Fire Statute provides total immunity to the shipowner for losses to cargo by fire unless caused by its design or neglect; it is not limited to liability *in personam*.

The petitioners by emphasizing the words "*no owner*" in the Fire Statute argue that the immunity given is restricted to such owner's *in personam* liability and does not extend to his vessel upon which fire occurs in the cargo (brief, p. 40) and cite *The Etna Maru*, 33 F. (2d) 232, as authority, in which the Circuit Court of Appeals for the Fifth Circuit reached this conclusion although neither appellant nor appellee in brief or argument made any such contention or even suggested it. Counsel in the cause at bar on both sides were counsel in *The Etna Maru*, supra. The strange hypothesis that an owner can be exonerated from liability while his property still remains liable originated entirely in the Circuit Court of Appeals for the Fifth Circuit in that cause and is contrary to both law and reason. This Court in *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420, 428, note 3, disapproved of the only doctrine for which *The Etna Maru*, supra, was cited by counsel for petitioners in that cause. The point for which *The Etna Maru*, supra, is now cited by petitioners was not then before this Court and consequently was not passed upon by it. However, it would seem that this Court by the use of the words "But compare The Rapid Transit, (D. C.) 52 Fed. 320, 321" in note 3, immediately after stating the ground of the

affirmance, at least indicated doubt of the doctrine since. *The Rapid Transit*, supra, is diametrically opposite to such doctrine as is also *Keene* v. *The Whistler*, 14 Fed. Cas. 208.

The Circuit Court of Appeals below disposed of the holding of *The Etna Maru* succinctly as follows:

> "So far as that decision retains any authority after *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420, we cannot agree: § 182 gives complete exoneration of liability; § 183 only a limitation of liability. To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing" (R. 2043).

The Fire Statute contemplates complete freedom from liability except when the expressed conditions are shown to exist. *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420, 425. Obviously a vessel owner is not completely freed from liability for loss or damage by fire if his vessel may be held therefor, since the money to pay for such damage must come from his funds. The terms of the statute are that "*No* owner of any vessel *shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever,* * * *.*" They contemplate full and complete immunity not only of the owner's bank account but also of his vessel unless his design or neglect caused the fire.

This Court has construed the phrase "owner of any vessel", in the Limitation of Liability Statute to apply to actions *in rem* as well as *in personam*, observing in *The City of Norwich*, 118 U. S. 468, 503:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles."

And see:

Hartford Accident Co. v. *Southern Pacific*, 273 U. S. 207, 216.

This Court has frequently held that the Fire Statute is remedial and should be construed liberally.

> *Walker* v. *Transportation Co.*, 3 Wall. 150;
> *Norwich Co.* v. *Wright*, 13 Wall. 104, 120-21.

In *The Queen of the Pacific*, 180 U. S. 49, 52-3, this Court held that a clause providing that neither the steamship company nor its stockholders should be liable unless notice of claim was presented within a specified time protected the vessel as well, saying:

> "In either event the money to pay for such damage must come from the treasury of the company; and we ought not to give such an effect to the stipulation as to enable the owner of the merchandise to avoid its operation by simply changing his form of action."

If this be true of a contractual stipulation in the carrier's own bill of lading, all the more should it be true of a broad remedial statute reflecting public policy.

The construction of the Fire Statute advanced in *The Etna Maru*, supra, would nullify the statute except in case of the vessel's total loss because the cargo owner could always avoid the immunity given by the statute by bringing his action *in rem*. This construction would in effect change the statute in actions *in rem* from one of exoneration to one of mere limitation of liability to the value of the vessel thus making it substantially equivalent to the third section of the Act of March 3, 1851 (Limitation of Liability). But this would be inconsistent with the holding of this Court in *Providence & N. Y. S. S. Co.* v. *Hill*, 109 U. S. 578, in which the liability under the two statutes is contrasted. It would add a new exception to the "complete immunity granted" by the Fire Statute contrary to this Court's holding in *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420, 425.

The President Wilson (N. D. Calif., S. D.), 5 F. Supp. 684, 685, was a proceeding *in rem* to recover for the loss of a cargo of sugar totally destroyed by fire. The Court

expressly disapproved of the doctrine of *The Etna Maru*, supra, that the Fire Statute is limited to personal exemption, and said:

> "Undoubtedly, the weight of authority clearly holds that, in actions in rem for the recovery of damage caused by fire, the 'fire statute' grants immunity of liability to the vessel, as well as personal exemption; vide *The Rapid Transit* (D. C.), 52 F. 320; *Keene* v. *The Whistler*, Fed. Cas. No. 7,645; *Dill* v. *The Bertram*, Fed. Cas. No. 3,910."

The Buckeye State (W. D. N. Y.), 39 Fed. Supp. 344, 346, contains the following statement:

> "The further claim is made by the libellant that where there is fire damage the Fire Statute, supra, leaves the owner liable for the value of the vessel, and it cites the Etna Maru, 5 Cir., 33 F. 2d 232, 233, certiorari denied 280 U. S. 603, 50 S. Ct. 85, 74 L. Ed. 648. No implication is to be drawn from the denial of certiorari that the Supreme Court indicates any expression upon the merits. Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401, 51 S. Ct. 498, 75 L. Ed. 1142. The decision in Etna Maru, supra, seems to be against the weight of the authorities and not in accord with the plain meaning of the statute. The Rapid Transit, D. C., 52 F. 320; The President Wilson, D. C., 5 F. Supp. 684; Keene v. The Whistler, Fed. Cas. No. 7645; Dill v. The Bertram, Fed. Cas. No. 3910. In a footnote in Earle & Stoddart v. Wilson Line, supra, reference is found to Etna Maru, supra, and The Rapid Transit, supra. The indication there seems to be that the Etna Maru decision was disapproved."

And see:

The Munaires (E. D. La.), 12 F. Supp. 913, 918.

Possibly the best criterion of *The Etna Maru*, supra, is that it has never been followed by any other case and has never been mentioned except with disapproval. Its only distinction is that it has so thoroughly met the dis-

approval of this Court as to be made the main subject of a note in *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420, 428.

POINT III

(Answering Proposition C)

It has never been held by this Court or by the Circuit Court of Appeals of any Circuit that the acceptance of cargo for transportation which is likely to heat, constitutes personal "design or neglect" of the shipowner if the method of stowage thereof is still "in flux".

Petitioners pose questions numbered I and IV (petition, pp. 7, 17) and claim that English courts and the Circuit Court of Appeals in other Circuits than the Second have held that such acceptance of cargo deprives the shipowner of the benefits of the Fire Statute, and *ergo* that a mere showing of such acceptance sustains cargo's burden of proof thereunder (petition, pp. 7-12, 18). This claim is not sustained by the authorities cited.

In *Williams S. S. Co.* v. *Wilbur*, 9 F. (2d) 622, the personal "neglect" found was the "improper stowage and inadequate ventilation" of the cargo which was "known to and acquiesced in by the general agent of the owner at Baltimore, who had supervision of the loading of cargo for the appellant for a period of three years" (pp. 622-23). Negligence was not predicated on the acceptance of the cargo, but on the method of stowage which had been "adopted and followed" (p. 623) by the carrier and acquiesced in by its general agent.

Bank Line v. *Porter*, 25 F. (2d) 843, relied on by petitioners as illustrating the Fourth Circuit's alleged conflict with the Second Circuit on this point, involves an entirely different set of facts from those at bar. The personal negligence held to deprive the owner of the immunity

afforded by the Fire Statute lay in its permitting the vessel to leave port with unseaworthy engines and boilers and in its failure to take precautions by unloading or ventilating the combustible cargo when it knew that the vessel was delayed for repairs for a 74-day period in the tropics. The Court specifically found that "A condition involving danger of fire, and known to the owner of the vessel, was permitted to exist through the owner's negligence * * *" (p. 845).

The Nichiyo Maru, 89 F. (2d) 539 (C. C. A. 4), did not involve the Fire Statute, and therefore no issue as to the personal design or neglect of the owner was presented to the Court. In that cause the Court found a breach of duty by the carrier in stowing "so large a quantity of this commodity closely packed in the holds of the vessels, with no more ventilation than the evidence shows to have been provided * * *" (p. 542). The Court did not hold that the acceptance of the cargo on a general ship, when there was no established custom of stowage, was a breach of duty, and, as pointed out above, the issue of personal negligence on the part of the owner was not even before the Court.

None of the above causes in any way resembled the cause at bar. Negligence, its existence or absence, must be determined on specific facts; whether, when negligence has been found, it should be attributed personally to the owner depends entirely on proof of such owner's participation in the acts or omissions which constitute such negligence.

In the cause at bar respondent-charterer accepted for carriage to U. S. Atlantic ports a common and usual article of commerce and knowing that it was a cargo which might heat, in direct proportion to its moisture and oil content, employed an experienced independent surveyor, Captain Fegen, to supervise the stowage, in no way restricting his selection of the method to be employed. Petitioners illogically contend that there was negligence of the char-

terer-respondent because, they argue, it was "naturally to be expected" that Captain Fegen would employ a method of stowage and ventilation similar to that which it had formerly used (petition, p. 8). On the contrary, it is much more probable that Captain Fegen, as an expert cargo surveyor, given complete freedom of choice, would "naturally" stow the cargo in accordance with the safest method which he knew.

Petitioners' labored attempt (petition, p. 9; brief, p. 28) to parallel the facts of the cause below with those proved in *Williams S. S. Co.* v. *Wilbur*, 9 F. (2d) 622, and thereby artificially to create a conflict of law between the Ninth and Second Circuits, is frustrated by their own admission that the negligence found in the cited cause lay in a subordinate's following "an improper method of stowage previously adopted" by the shipowner (petition, p. 9). The personal negligence of the owner in such cause lay in his knowledge, through his general agent at Baltimore, that such improper method was in customary use and was being employed in the stowage of the cargo. In the cause at bar the duty of planning and supervising the stowage had been delegated to Captain Fegen, an experienced Lloyd's agent marine surveyor. He was not a general agent for respondents (R. 1975, 2044) and his independent employment belies petitioners' contention that, as in *Williams S. S. Co.* v. *Wilbur*, supra, the owner had "adopted" a method of stowage which would "naturally" be followed.

Petitioners claim that *Hines* v. *Butler*, 278 F. 877, is in accord with *Bank Line* v. *Porter*, 25 F. (2d) 843, and that both are in conflict with the decision herein (petition, pp. 10-11). But those causes are not similar to that at bar. It is patent that neither an owner's knowledge that nothing was being done by way of ventilation or unloading to protect a cargo of combustible jute on board his vessel, during a delay for 74 days in a hot climate while her engines were undergoing repairs as in *Bank Line* v. *Porter*, supra, nor its failure over a long period of time to supply

fire-fighting equipment to its vessel that was in its home port daily and to ascertain that its crew had been trained to protect passengers and cargo in the emergency of fire as in *Hines* v. *Butler*, supra, is in any respect comparable to accepting a cargo of fish meal with the knowledge that it is susceptible to heating. The dissimilarity is so apparent that it cannot be logically argued that exoneration of the charterer-respondent by the Circuit Court of Appeals for the Second Circuit below demonstrates a rejection by it of the principles of law adhered to in the Fourth Circuit.

Similarly in *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.* (1915), A. C. 705, the acceptance of the cargo of benzine, although attendant with special perils, was not held to be "fault or privity" of the owners, but rather the owners were refused exoneration because of the failure of the managing owner to advise the master of defects in the ship's boilers and to give him special instructions concerning the handling thereof. Petitioners contend that the Circuit Court of Appeals below in order to harmonize its decision with *Lennard's Carrying Co., Ltd.* v. *Asiatic Pet. Co., Ltd.*, supra, should have found personal negligence on the part of the charterer-respondent in the acceptance of fish meal for carriage with the knowledge that it might heat. But this is not so. The two decisions are in complete harmony. There is a clear distinction between failure to advise a master of a structural defect peculiar to the vessel he is to handle and the acceptance of a well known and common article of commerce, even though it be susceptible to heating.

The history of fish meal carriage (supra, pp. 5-6), and the fact that it had not yet certainly appeared at the time of shipment that properly made fish meal could not be adequately protected by the use of rice ventilators (R. 2045), removes all basis for petitioners' contention that charterer-respondent was negligent in accepting this shipment. Such acceptance was not a "fundamental breach of duty" (brief, p. 24), as petitioners contend, because charterer-respond-

ent, in addition to having a long experience in carrying fish meal successfully, took the precaution of employing an independent cargo surveyor and delegating to him, as an expert, the duty of supervising the stowage of fish meal on its vessels, in order to eliminate the chance of any unsuccessful carriage.

Petitioners distort the meaning of the Circuit Court of Appeals' opinion (R. 2045) when they argue that the Court held negligence is not proved unless the acts of omission or commission are certain to result in damage (brief, p. 38). Such was not the Court's ruling. The portion of its opinion cited by petitioners (brief, p. 38) deals with petitioners' contention below that respondent-charterer accepted the fish meal without knowing how to carry it safely. The Court found that charterer-respondent had been successful in carrying large quantities of fish meal on many voyages and therefore did not accept the petitioners' shipment with a consciousness that there was no successful method of carriage. Rice ventilators had been previously used successfully as an auxiliary to the permanent ventilating system and "* * * it had not yet certainly appeared that, given properly made meal, such ventilation was inadequate * * *" (R. 2045). This statement of the Court, properly confined to the issue under discussion, has no relation to cases cited such as *Cornec* v. *Baltimore & Ohio R. R. Co.*, 48 F. (2d) 497; *Texas & Pac. Ry. Co.* v. *Carlin*, 111 F. 777; *The Santa Rita*, 176 F. 890, and *Johnson* v. *Kosmos Portland Cement Co.*, 64 F. (2d) 193. The Circuit Court of Appeals did not hold that the method of stowing the fish meal on board the *Venice Maru* was not negligent, even though similar stowage had previously resulted in its carriage without damage, but rather that respondent-charterer was not cognizant of a lack of knowledge on how to carry fish meal without heating, because there was no certainty that rice ventilators were not adequate. At the time of the shipment the use of rice ventilators in fish meal stowage was approved

as the best known method by cargo-claimants' underwriter's surveyors (R. 200-1, 204, 208, 216, 219-21, 224, 1094, 1096, 1106). The use of the block and channel method was not adopted until the following year—1935 (R. 1984).

Petitioners' argument, if accepted, would prevent any carriage of heating cargo until an absolutely safe method of stowage was designated. It would prevent any experimentation whatsoever although a safe method could only be found by experimentation. It would make the carrier an insurer of the outcome of all heating cargoes, in spite of the immunity given by the Fire Statute, although the cargo-owner who shipped the heating cargo knew of its propensities as well as, if not better than, the shipowner. Such an argument is clearly unsound.

The decision below is in full accord with this Court's decision in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420.

POINT IV

(Answering Proposition D)

The holding of the Circuit Court of Appeals for the Second Circuit that the delegation by a vessel owner to an expert of the duty of laying out and supervising the stowage of cargo, which it knows to be susceptible to heating, without informing him of previous instances of heating that had occurred in its experience, did not constitute "neglect" within the meaning of the Fire Statute, is not in conflict with decisions of the Circuit Court of Appeals in other Circuits or of this Court.

Petitioners cite several cases which are said to establish the principle that a vessel owner is deprived of the benefits of the Fire Statute unless, in delegating the duty of stowing hazardous cargo to an expert, it informs him of previous instances of heating in its experience (petition, question II, p. 12; brief, Point II, p. 29). None of the cited cases establishes the principle for which it is cited.

The Circuit Court of Appeals for the Fourth Circuit in *Bank Line* v. *Porter*, 25 F. (2d) 843, as we have pointed out, supra, p. 11, did not hold that the owner of a vessel was deprived of the immunity granted by the Fire Statute because of his failure to furnish information of previous breakdowns of her engines and boilers to Lloyd's surveyor; such failure was merely held to affect the weight to be accorded the surveyor's certificate of seaworthiness. Moreover, it is to be noted, that the information there withheld was of peculiar facts concerning the particular vessel which the surveyor could not have known except through the shipowner's disclosure.

In *The Schwan* (1909), A. C. 450; *Lennard's Carrying Co.* v. *Asiatic Pet. Co.* (1915, A. C. 705, and *The Clan Gordon* (1924), A. C. 100, the negligence found was the failure to disclose information concerning the peculiar apparatus, structure or stability of the particular vessel. These were facts which either had to be told to those in command of the vessel, or to be learned by sad experience. In *Tempus Shipping Co.* v. *Louis Dreyfus* (1930), 1 K. B. 596, 712, the Court refused to apply the doctrine of the cited cases to the failure of owners to give instructions concerning matters "which they might well feel * * * could be left to the practical sense and experience of the master". It distinguished *The Clan Gordon*, supra, saying: "In that case it was held that the matter in question involved a question of scientific calculation which might well be beyond the scope of a ship's master." On the contrary, in the cause at bar, Captain Fegen, who was an expert surveyor of heating cargoes including sardine meal, knew the characteristics of sardine meal which was a common article of commerce, and knew that it required ventilation to prevent heating. It was not unreasonable for the respondent-charterer to expect such an expert on sardine meal to possess full knowledge of its characteristics under stowage in ships.

As to the duty to tell Captain Fegen that despite the use of rice ventilators, previous shipments had heated, the court below said:

> "* * * it does not appear that Fegen did not inform himself; or that, if he did not, his ignorance made any difference: i.e., that his knowledge of the charterer's past experience would have led him to discard 'rice ventilators'" (R. 2046).

Rice ventilators are employed as auxiliaries to permanent ventilation systems. Even if, as the District Court found, they did not afford sufficient supplementary ventilation (R. 1985), by no means was their use the *cause* of the fire. Their use was not dangerous, but at most inadequate.

Captain Fegen "had been a marine surveyor for 23 years, all the time in Kobe acting as Lloyd's agent; he had surveyed all sorts of cargoes including sardine meal; before becoming a surveyor he had had twenty years sea experience from seaman to captain; and he held a master's license both on British and Japanese ships" (R. 2043). "There is not the least evidence that anyone better qualified was available at Kobe, or, indeed, anywhere else in Japan" (R. 2046). In the light of these findings it cannot be successfully urged that charterer-respondent was negligent in not telling Captain Fegen that fish meal required ventilation or that on five out of 112 previous voyages of its ships it had heated even though rice ventilators had been used in the fish meal stowage on two of such voyages. As an expert he is presumed to have known these facts.

FINAL POINT

The petition for writ of certiorari should be denied.

Respectfully submitted,

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New York, N. Y., April 24, 1943.